86-1469

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

STATE OF ALABAMA, PETITIONER

VS.

MARK MONROE GEESLIN, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

OF

DON SIEGELMAN
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

J. ELIZABETH KELLUM
ASSISTANT ATTORNEY GENERAL

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The Alabama State House
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ATTORNEYS FOR PETITIONER

48 pp

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QUESTION PRESENTED

1. Does this Honorable Court's decision in Brady v. Maryland, 373 U.S. 83 (1963), require the prosecution to turn over information to the defendant which was equally available to both the defense and prosecution and which, with any reasonable diligence, the defendant could have obtained himself?

THE PARTIES

In the Circuit Court of Madison County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Mark Monroe Geeslin, who is the Respondent herein.

The matters at issue here were first raised in the Circuit Court of Madison County, Alabama, by Respondent's motion

for a new trial based on the prosecution's failure to disclose exculpatory evidence and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming Respondent Geeslin's conviction is not as yet reported but will be reported as follows:

Geeslin v. State, ___ So.2d ___ (Cr. App. Ala. 1986

A copy of the same is submitted as Appendix "A" to this petition.

The opinion of the Supreme Court of Alabama reversing the Court of Criminal Appeals' decision and opinion in this case is not as yet reported but will be reported as follows:

Ex parte: Geeslin; In re: Geeslin v. State, ___ So.2d ___ (S. Ct. Ala. 1986)

A copy of the same is submitted as Appendix "B" to this petition.

The order of the Court of Criminal Appeals of Alabama conforming its decision to that of the Alabama Supreme Court is not as yet reported but will be reported as follows:

Geeslin v. State, ___ So.2d ___ (Cr. App. Ala. 1987)

A copy of the same is submitted as Appendix "C" to this petition.

JURISDICTION

The order of the Court of Criminal Appeals of Alabama reversing Respondent's conviction was issued on January 13, 1987 (Appendix "C", page 31) and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States, which reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or in public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Section one of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Respondent, Mark Monroe Geeslin, was indicted by the October 1984 term of the Grand Jury of Madison County, Alabama, and charged with one count each of rape in the first degree and kidnapping in the first degree. (R.p. 436) Respondent entered a plea of not guilty to both charges. (R.p. 448)

Prior to trial a general discovery motion was filed by Respondent requesting the production of certain items from the prosecution. (R.p. 438) The prosecution's answer to this motion

contained no copies of any reports and stated tha the only tests known to the prosecution at that time were those performed by the State Department of Forensic Sciences on hair, saliva, etc. (R.p. 441)

The cause came up for trial before the Honorable S. A. Watson, Jr., a circuit judge and a jury, on January 31, 1985. The Respondent was found guilty as charged on both counts and sentenced to two consecutive life sentences. (R.p. 449)

Following the trial Respondent moved for a new trial on the grounds that the prosecution failed to disclose exculpatory information. (R.pp. 450-452) After a hearing on the motion, the motion was denied. (R.p. 473)

Appeal was taken to the Court of Criminal Appeals of Alabama, which on

January 7, 1986, affirmed Respondent's conviction and sentence, finding that the prosecution's conduct in failing to disclose certain information did not violate the rule in Brady since the Respondent was on notice of the essential facts. Geeslin v. State, ___ So.2d ___ (Cr. App. Ala., 1986); Appendix "A".

A writ of certiorari was sought by Respondent Geeslin from the Supreme Court of Alabama. On November 7, 1986, the Court reversed the Court of Criminal Appeals of Alabama. The Alabama Supreme Court wrote, inter alia:

> "Without deciding whether the prosecutor's duty to produce exculpatory evidence upon a specific motion is obviated where the defendant and his counsel have incontrobertible knowledge of the evidence, we hold that the trial court and the Court of Criminal Appeals erred in holding that the district attorney's failure to produce or inform the defense

> of the report was not a "suppression" on the ground of a finding, based on controverted testimony of the district attorney and a police officer, that the defendant was aware of facts which should have led him to discover the test results." (Ex parte: Geeslin, ___ So.2d ___, ___; Appendix "B", pages 25-26).

The Petitioner State applied for rehearing; the same being denied on December 5, 1986. (Appendix "B"; page 30).

On January 13, 1987, the Court of Criminal Appeals conformed its decision to that of the Alabama Supreme Court. (Geeslin v. State, ___ So.2d ___ (Cr. App. Ala. 1987); Appendix "C").

STATEMENT OF THE FACTS

The general facts have never been in any serious dispute. The Court of Criminal Appeals found the facts as follows:

> "...At trial the State produced three witnesses that placed appellant at the shopping mall where the kidnapping and rape occurred. The victim identified her assailant as a white male, approximately 5'11", 170 to 180 pounds, with light brown or dark blond hair, in his mid-twenties, unshaven or with several days growth of facial hair, and wearing a dark overcoat, down to his knees, and blue jeans. The offense took place at approximately 9:00

p.m. The victim identified appellant's photo from some 25 to 30 photos supplied by the police department and picked appellant out of a lineup at the police station. A mall employee testified that she observed appellant in the mall between 8:30 and 8:40 p.m. on the night in question. Appellant was wearing a black overcoat and had approximately a two-day growth of facial hair. Appellant's former mother-in-law and brother-in-law also testified that they observed appellant in the mall at approximately 8:25 p.m. that night and testified that he was wearing a dark "raincoat" that

fell to his knees and that he had "whiskers."

Appellant produced several witnesses who testified that appellant did not own and had never worn a long, dark coat and that appellant was clean-shaven on the evening of the kidnapping and rape. Some of these witnesses testified that they talked with appellant, by phone, between 9:30 and 10:00 p.m. that evening. Through these witnesses appellant attempted to establish that someone other than himself committed the offenses charged.

Two weeks after the trial of this cause, defense counsel learned that the victim had contracted a venereal disease

as a result of the rape. Defense counsel also learned that appellant had been tested for gonorrhea by the State twelve days after the rape occurred, and this test came back negative for gonorrhea. Appellant contends that the results of this test were never communicated to counsel or appellant and that the State therefore violated its duty to disclose exculpatory material as ordered by the trial court, and in accordance with due process standards established in Brady v. Maryland, 373 U.S. 83 (1963), and A.R.Crim.P.Temp. Rule 18.1(d).

A hearing on appellant's motion for new trial was held

on March 28, 1985. At this hearing Assistant District Attorney James Accardi testified that he was aware that the victim had contracted gonorrhea shortly after the incident occurred. Mr. Accardi had been informed of this by Detective James Parker, and Accardi had seen the hospital emergency room report which was completed the night of the rape. Accardi was also concerned about the results of the test conducted on appellant and maintained contact with Parker on this subject. Parker subsequently informed Accardi that Appellant's test was negative. Accardi stated that Parker ex-

plained to appellant the reasons why he was being tested. Accardi admitted that he never discussed this information with defense counsel because he "expected the defense had access to it."

Detective Parker testified that he learned the victim had contracted gonorrhea and that he talked with appellant about being tested. Parker testified that he spoke with appellant and appellant's attorney, Mr. Mark McDaniel, about the need for appellant to be tested. (Mr. McDaniel did not represent appellant at trial and did not testify at the hearing.) Parker stated:

"We explained to Mark McDaniel and also Mark Geeslin about the tests that we were going to need. We were going to need blood samples, hair samples, saliva samples, and a test for gonorrhea. Mr. McDaniel advised myself, along with Sergeant Thompson, that he had told Mark Geeslin to cooperate with us, that all we would need would be a court order to obtain those things and, therefore, he was going to cooperate."

On cross-examination, Parker testified as follows:

"Q. Mr. Parker, did you have a conversation with Mark when you took him down for the test about the test and why you were doing it?

"A. Yes, sir, I did.

"Q. Would you tell the jury [sic] what you informed him at that time?

"A. I advised him that the victim had contracted the disease and that we were asking him to submit to a test to see if, in fact, he had this disease.

"Q. Did he indicate that he understood that procedure to you?

"A. Yes, sir, he did.

"Q. What did he tell you about it?

"A. He said, well good, I will take the test, and if I haven't got it, that will mean I am innocent. I wasn't involved in it.

"Q. Did you observe the procedure conducted?

"A. I did.

"Q. Were you present when the procedure was conducted?

"A. Yes, sir, I was."

Appellant testified that he was told by one of the detectives that he would be subjected to blood, hair, and semen samples, but he was not told what the tests were specifically for. Appellant was never informed of the results of these tests. According to appellant he was not aware that he had been tested for gonorrhea until he explained the procedure to another inmate, who told him what test had been performed.

The trial court denied appellant's motion for new trial, stating:

> "The Court has considered the motion grounds and the evidence presented as well as the brief submitted. The Court notes that the State failed to comply with the Court's order to provide the defendant, prior to trial, with all exculpatory evidence in the State's possession. The Court observed that there is clear and convincing evidence to establish that the defendant was aware, prior to trial, of the existence of the evidence which he asserts was not disclosed by the State. Based upon that this Court finds that the 'State's compliance with the order of disclosure was in good faith and totally adequate. The Court finds no other ground supported in law or fact." Geeslin v. State, ___ So.2d ___; Appendix "A", pages 2-9).

> "...In the case at bar, appellant was obviously aware that certain tests had been conducted by the State. Parker testified that he specifically told appellant why he was being

tested and that he was being tested for gonnorhea. The results of this test could easily have been obtained by appellant from the State lab. Appellant was on notice of the essential facts which would have enabled him to take advantage of the gonnorhea test conducted by the State. The State, therefore, cannot be said to have suppressed this evidence..." (Geeslin v. State, ___ So.2d ___, ___; Appendix "A", pages 13-14).

For its part, the Alabama Supreme Court did not dispute these findings.

SUMMARY OF THE ARGUMENT

The State of Alabama, Petitioner in this case, respectfully submits that this Honorable Court's decision in Brady v. Maryland, 373 U.S. 83 (1963), does not require the prosecution to turn over information to the defendant which was equally available to both the defense and prosecution and which, with any reasonable diligence, the defendant could have obtained himself. The Petitioner further submits that the decision of the Supreme Court of Alabama which held that it was error for the prosecution to fail to disclose such information to the defense was a misinterpretation of Brady v. Maryland and its progeny.

ARGUMENT

I.

INTRODUCTION: THE RULE IN BRADY V. MARYLAND, 373 U.S. 83 (1963).

In order to establish a Brady violation the defendant must prove: (1) the prosecution's suppression of evidence; (2) the favorable character of the suppressed evidence for the defense; and (3) the materiality of the suppressed evidence. Moore v. Blackburn, 607 F.2d 148, 150 (5th Cir. 1979). "The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Moore v. Illinois, 408 U.S. 786, 794 (1972). Whether the withheld evidence is material is determined by the

following standard: the conviction should be reversed only if the undisclosed evidence would create "a reasonable doubt that did not otherwise exist." United States v. Agurs, 427 U.S. 97, 112 (1976). However, if there is no reasonable doubt about guilt, whether or not additional evidence is considered, there is no justification for a new trial. United States v. Agurs, supra, 427 U.S. at 112-113.

The term suppression "means nondisclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence." Ogden v. Wolff, 522 F.2d 816, 820 (8th Cir. 1975). "The concept of 'suppression' implies that the Government has information in its possession of which the defendant lacks knowledge and which the defendant

would benefit from knowing." United States v. Natale, 526 F.2d 1160, 1170 (2d Cir. 1975). However, "[e]vidence is not 'suppressed' if the defendant either knew ... or should have known ... of the essential facts permitting him to take advantage of any exculpatory evidence." United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982). Furthermore, there can be no suppression by the State of evidence already known by and available to the defendant prior to trial. DeBerry v. Wolff, 513 F.2d 1336, 1340 (8th Cir. 1975).

Yet, the Supreme Court of Alabama held that both the trial court and the Court of Criminal Appeals of Alabama erred in denying Respondent's motion for a new trial based on the State's failure to disclose the results of a gonorrhea test though the Respondent and the

attorney respresenting him at that time were aware that such a test had been performed and defendant's trial counsel could have obtained the results of the test by other methods.

II.

REASONS FOR GRANTING THE WRIT: CONFLICT WITH PRIOR DECISIONS OF THIS HONORABLE COURT.

The major conflict arising out of the ruling of the Supreme Court of Alabama in the present case comes in attempting to reconcile it with more recent decisions by the federal courts which expound upon the principle found in Brady. It would appear that the Alabama Supreme Court has elected to ignore a line of decisions which makes it clear that there is no suppression of exculpatory evidence if the defendant is or should have been aware of such evidence, and with reasonable diligence, could have obtained it himself.

In United States v. Brown, 582 F.2d 197, 200 (2d Cir. 1978), the Court stated:

> "Under Brady, the Government may not withhold material exculpatory evidence specifically requested by the defense .... However, where the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a Brady violation by not bringing the evidence to the attention of the defense."

See also United States v. Ramirez, [No. 86-3264] ___ F.2d ___ (5th Cir. 1987); Pina v. Henderson, 752 F.2d 47 (2d Cir. 1985); United States v. Robinson, 560 F.2d 507 (2d Cir. 1977); United States v. Stewart, 513 F.2d 957 (2d Cir. 1975); United States v. Ruggiero, 472 F.2d 599 (2d Cir. 1973).

The Petitioner submits that it is the initial decision of the Court of Criminal Appeals of Alabama, and not the subsequent decisions of the Alabama Supreme Court and the Court of Criminal Appeals conforming thereto, which is in

accord with numerous other decisions on this issue in various circuits with which this Honorable Court has apparently found favor, including both the Fifth and Eleventh Circuit which have held that Brady does not require the government to turn over information which, with any reasonable diligence, the defendant can obtain himself. United States v. McKenzie, 768 F.2d 602, 608 (5th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 861, 88 L.Ed.2d 900 (1986); Jarrell v. Balkcom, 735 F.2d 1242, 1258 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2331, 87 L.Ed.2d 670 (1985). Furthermore, when the evidence is available equally to defense and prosecution, the defendant must bear the responsibility of his failure to diligently seek its discovery. United States v. McKenzie, supra, 768 F.2d at

608; United States v. Cortez, 757 F.2d 1204, 1208 (11th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 310, 88 L.Ed.2d 287 (1985). Additionally, in the case of United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982), cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1982), the Second Circuit carefully defined "suppression" and restricted the scope of the government's obligation under Brady as follows:

> Evidence is not "suppressed" if the defendant either knew, see, e.g. United States v. Robinson, 560 F.2d 507, 518 (2d Cir. 1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978), or should have known, see, e.g., United States v. Brown, 582 F.2d 197, 200 (2d Cir.), cert. denied, 439 U.S. 99 S.Ct. 289, 58 L.Ed.2d 262 (1978), of the essential facts permitting him to take advantage of any exculpatory evidence.

Here, the evidence was taken from the Respondent's body and was in the

possession and control of the health department -- equally available to both the defense and the prosecution, just as in McKenzie. Additionally, the testimony of Mr. Accardi, the prosecuting attorney, points out that the twelve day period between the rape and the test would render the test results inconclusive as to whether Respondent was the assailant. (R.pp. 405-409). Furthermore, the testimony established that at no time did the prosecution ever receive a written report on the test results. Respondent's attorneys could have telephoned the county health department and found out the test results just as easily as the prosecution did.

Additionally, the test results would not have had any effect on the outcome of the trial. There were numerous eye witnesses placing Respondent at the scene

of the abduction. The victim, Mrs. Watts, picked Respondent out of a group of photographs and out of a line-up at the police station. Since there was no reasonable doubt about Respondent's guilt, there was no justification for the Alabama Supreme Court's reversal of Respondent's conviction.

Therefore, the Petitioner submits that Respondent has failed to meet the requirements necessary for reversal. The testimony of both Mr. Accardi and Detective Parker at the hearing for a new trial was that Respondent and his attorney were present at the lineup and the subsequent requests for testing, and were aware that a gonorrhea test would be performed. (R.pp. 404-405) Yet, Respondent's trial counsel maintained that he had no knowledge of the test until two weeks after the trial. It

would appear, however, that in consulting with Respondent, trial counsel should have been able to discover what tests were performed on him, and if not from Respondent, certainly from Respondent's original counsel. The Petitioner finds it hard to believe that the Respondent could forget that such an intrusive test was performed on him, or that he was so naive as to not understand why such a test was being performed. Respondent was escorted by the police to the county health department where he had to partially undress so that a semen sample could be taken from his penis. This procedure, in addition to the fact that the victim's hospital records (of which the defense had copies) revealed that she had contracted gonorrhea, should certainly suggest that a gonorrhea test was performed on Respondent. Mr.

Accardi's testimony makes it clear that he believed Respondent's trial counsel was in possession of this information and had gone to the trouble to obtain witnesses to impeach the results of the gonorrhea test. Therefore, the Petitioner respectfully suggests that the trial court's denial of a new trial was correct due to the fact that due diligence on the part of Respondent's trial counsel would have revealed the existence of a gonorrhea test.

"Further justice, and the American way do not ... require the (State) to discover and develop the defendant's entire defense." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980). The Alabama Supreme Court was well aware that the attorney representing the Respondent at the time the test was performed instructed Respondent to cooperate with

the police. Yet, because Respondent saw fit to change attorneys at some later date, the Alabama Supreme Court seems to feel that such action obligates the prosecuting attorney to ensure that the Respondent's trial counsel had all the information available to Respondent's original defense counsel by requiring the prosecuting attorney to disclose information which Respondent's trial counsel should have learned from either the Respondent himself or original defense counsel.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama respectfully submits that the decisions and opinions of the Honorable Supreme Court of Alabama in this case and that of the Court of Criminal Appeals of Alabama conforming thereto, present conflicts with prior decisions and opinions of this Honorable Court on the prosecution's duty to disclose to the defense information which was equally available to the defense and prosecution and which, with any reasonable diligence, the defendant could have obtained himself. For these reasons, the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions of the Honorable Appellate Courts of Alabama and on such review will reverse the

decisions of said Courts to the extent that the same hold that the conduct of the prosecution in this case violated the rule of Brady v. Maryland.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
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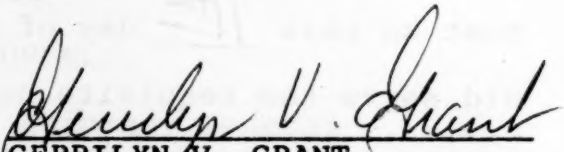
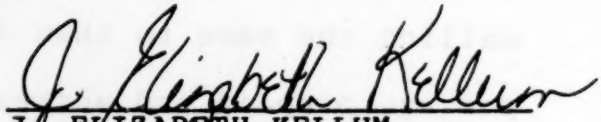


GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL



J. ELIZABETH KELLUM
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Gerrilyn V. Grant, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 11th day of March, 1987, I did serve the requisite number of copies of the foregoing on the Attorneys for Mark Monroe Geeslin, Petitioner, by mailing the same to them first-class postage prepaid and addressed as follows:

Honorable Joe M. Berry
Honorable Thomas E. Parker, Jr.
Berry, Ables, Tatum, Little & Baxter, P.C.
P.O. Box 165
Huntsville, Alabama 35801

and

Honorable C. Michael McInnish
770 South McDonough
Suite 209
Montgomery, Alabama 36104

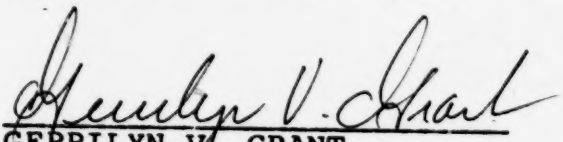


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TABLE OF APPENDICIES

APPENDIX "A"

January 7, 1986

THE STATE OF ALABAMA ---
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1985-86

8 DIV. 306

Mark Monroe Geeslin

v.

State

Appeal from Madison Circuit Court

PATTERSON, JUDGE

Appellant, Mark Monroe Geeslin, was convicted of kidnapping in the first degree and rape in the first degree. See §13A-6-43 and §13A-6-61, Code of Alabama (1975). The trial court imposed a

sentence of life imprisonment in the state penitentiary for each offense, to run consecutively.

Two issues are raised on appeal, neither of which requires a detailed account of the facts. Appellant first alleges that the State failed to disclose the results of medical tests specifically requested by the defense. Secondly, it is argued that the trial court's restricting closing arguments to forty minutes violated appellant's right to due process.

I

At trial the State produced three witnesses that placed appellant at the shopping mall where the kidnapping and rape occurred. The victim identified her assailant as a white male, approximately

5'11", 170 to 180 pounds with light brown or dark blond hair, in his mid-twenties, unshaven or with several days growth of facial hair, and wearing a dark overcoat, down to his knees, and blue jeans. The offense took place at approximately 9:00 p.m. The victim identified appellant's photo from some 25 to 30 photos supplied by the police department and picked appellant out of a lineup at the police station. A mall employee testified that she observed appellant in the mall between 8:30 and 8:40 p.m. on the night in question. Appellant was wearing a black overcoat and had approximately a two-day growth of facial hair. Appellant's former mother-in-law and brother-in-law also testified that they observed appellant in the mall at approximately 8:25 p.m. that night and

testified that he was wearing a dark "raincoat" that fell to his knees and that he had "whiskers."

Appellant produced several witnesses who testified that appellant did not own and had never worn a long, dark coat and that appellant was clean-shaven on the evening of the kidnapping and rape. Some of these witnesses testified that they talked with appellant, by phone, between 9:30 and 10:00 p.m. that evening. Through these witnesses appellant attempted to establish that someone other than himself committed the offenses charged.

Two weeks after the trial of this cause, defense counsel learned that the victim had contracted a venereal disease as a result of the rape. Defense counsel also learned that appellant had been

tested for gonorrhea by the State twelve days after the rape occurred, and this test came back negative for gonorrhea. Appellant contends that the results of this test were never communicated to counsel or appellant and that the State therefore violated its duty to disclose exculpatory material as ordered by the trial court and in accordance with due process standards established in Brady v. Maryland, 373 U.S. 83 (1963), and A.R.Crim.P.Temp. Rul3 18.1(d).

A hearing on appellant's motion for new trial was held on March 28, 1985. At this hearing Assistant District Attorney James Accardi testified that he was aware that the victim had contracted gonorrhea shortly after the incident occurred. Mr. Accardi had been informed of this by Detective James Parker, and Accardi had

seen the hospital emergency room report which was completed the night of the rape. Accardi was also concerned about the results of the test conducted on appellant and maintained contact with Parker on this subject. Parker subsequently informed Accardi that appellant's test was negative. Accardi stated that Parker explained to appellant the reasons why he was being tested. Accardi admitted that he never discussed this information with defense counsel because he "expected the defense to access to it."

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> "We explained to Mark McDaniel and also Mark Geeslin about the tests that we were going to need. We were going to need blood samples, hair samples, saliva samples, and a test for gonorrhea. Mr. McDaniel advised myself, along with Sergeant Thompson, that he had told Mark Geeslin to cooperate with us, that all we would need would be a court order to obtain those things and, therefore, he was going to cooperate."

On cross-examination, Parker testified as follows:

> "Q. Mr. Parker, did you have a conversation with Mark when you took him down for the test about the test and why you were doing it?
>
> "A. Yes, sir, I did.
>
> "Q. Would you tell the jury [sic] what you informed him at that time?

"A. I advised him that the victim had contracted the disease and that we were asking him to submit to a test to see if, in fact, he had this disease.

"Q. Did he indicate that he understood that procedure to you?

"A. Yes, sir, he did.

"Q. What did he tell you about it?

"A. He said, well good, I will take the test, and if I haven't got it, that will mean I am innocent. I wasn't involved in it.

"Q. Did you observe the procedure conducted?

"A. I did.

"Q. Were you present when the procedure was conducted?

"A. Yes, sir, I was."

Appellant testified that he was told by one of the detectives that he would be subjected to blood, hair, and semen samples, but he was not told what the

tests were specifically for. Appellant was never informed of the results of these tests. According to appellant he was not aware that he had been tested for gonorrhea until he explained the procedure to another inmate, who told him what test had been performed.

The trial court denied appellant's motion for new trial, stating:

> "The Court has considered the motion grounds and the evidence presented as well as the brief submitted. The Court notes that the State failed to comply with the Court's order to provide the defendant, prior to trial, with all exculpatory evidence in the State's possession. The Court observed that there is clear and convincing evidence to establish that the defendant was aware, prior to trial, of the existence of the evidence which he asserts was not disclosed by the State. Based upon that this Court finds that the State's compliance with the order of disclosure was in good faith and totally adequate. The Court finds no other ground supported in law or fact."

Appellant argues that Brady, supra, requires the State to disclose the fact of the victim's contracting gonorrhea and the fact that appellant's test results were negative. In order to establish a Brady violation the appellant must prove: "(1) The prosecution's suppression of evidence; (2) the favorable character of the suppressed evidence for the defense; (3) the materiality of the suppressed evidence." Moore v. Blackburn, 607 F.2d 148, 150 (5th Cir. 1979); Knight v. State, [Ms. 5 Div. 887, October 8, 1985] ___ So.2d ___ (Ala.Crim.App. 1985). "The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment." Moore v. Illinois, 408 U.S. 786, 794 (1972).

The trial court clearly found the element of "suppression" missing from appellant's proof. There was conflicting evidence presented as to appellant's knowledge of being tested for gonorrhea because the victim had contacted gonorrhea. Obviously, the trial judge believed Officer Parker. Any conflict in the evidence was for the trial court to resolve, and his ruling will not be disturbed absent a showing of abuse of discretion.

The term suppression "means non-disclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence." Ogden v. Wolff, 522 F.2d 816, 820 (8th Cir. 1975). "The concept of 'suppression' implies that the Government has information in its possession of which the defendant

lacks knowledge and which the defendant would benefit from knowing." United States v. Natale, 526 F.2d 1160, 1170 (2d Cir. 1975). "Evidence is not 'suppressed' if the defendant either knew ... or should have known ... of the essential facts permitting him to take advantage of exculpatory evidence." United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982). "There could be no suppression by the state of evidence already known by and availab e to [the defendnt] prior to trial." DeBerry v. Wolff, 513 F.2d 1336, 1340 (8th Cir. 1975).

In United States v. Brown, 582 F.2d 197, 200 (2d Cir. 1978), the Court stated:

> "Under Brady, the Government may not withhold material exculpatory evidence specifically requested by the defense ....

> However, where the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a Brady violation by not bringing the evidence to the attention of the defense."

See also United States v. Ruggiero, 472 F.2d 599 (2d Cir. 1973); United States v. Stewart, 513 F.2d 957 (2d Cir. 1975); United States v. Robinson, 560 F.2d 507 (2d Cir. 1977); Pina v. Henderson, 752 F.2d 47 (2d Cir. 1985). We agree with the propositions expressed by the above cited cases. The State is not required to make information known to a defendant who is on notice of the essential facts which would enable him to take advantage of any exculpatory evidence that may be present. There can be no suppression where the defendant has knowledge of the facts allegedly suppressed.

In the case at bar, appellant was

obviously aware that certain tests had been conducted by the State. Parker testified that he specifically told appellant why he was being tested and that he was being tested for gonnorhea. The results of this test could easily have been obtained by appellant from the State lab. Appellant was on notice of the essential facts which would have enabled him to take advantage of the gonnorhea test conducted by the State. The State, therefore, cannot be said to have suppressed this evidence.

> "The purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him."

Ruggiero, 474 F.2d at 604. Because the

information was known to appellant, his arguments that reversal is required under Brady; A.R.Crim.P.Temp. 18.1(d); or the theory of newly discovered evidence, are without merit. We find no abuse of discretion in the trial court's denial of appellant's motion for a new trial.

II

Appellant next contends that the trial court's limiting closing arguments to forty-five minutes per side violated his constitutional right to a fair trial. Appellant maintains that due to the length of the trial (two days) and the number of witnesses (twenty-one), more time should have been alloted for closing arguments.

In Smith v. State, 364 So.2d 1, 13 (Ala.Crim.App. 1978), this court stated:

"Much discretion is allowed the trial court in respect to limiting arguments of counsel, and in the absence of some abuse of that discretion, no error exists." We find no abuse of discretion in the case at bar. This cause was not extermely complex and many of the witnesses presented cumulative and repetitive testimony. No error was committed by the trial court's limiting closing arguments to forty-five minutes per side.

Based on the foregoing, this case is due to be, and is hereby, affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

APPENDIX "B"

November 7, 1986

THE STATE OF ALABAMA - - - - - -
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1986-87

85-566 Ex parte: Mark Monroe Geeslin

(In re: Mark Monroe Geeslin v. State)

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

ALMON, JUSTICE.

This Court granted a petition for writ of certiorari in this case because it appeared that the judgment of the Court of Criminal Appeals was based upon an incorrect application of the principle of Brady v. Maryland, 373 U.S. 83 (1963). Mark Monroe Geeslin was convicted of

kidnapping and rape. He contends that he was denied his right to a fair trial and to due process of law by the prosecutor's failure to produce an exculpatory medical report even though he requested production of all such reports. The Court of Criminal Appeals affirmed, holding that there was no suppression of evidence because Geeslin "was on notice of the essential facts."

A standard rape examination was performed on the victim shortly after the rape, including a vaginal smear. This smear showed the presence of sperm carrying gonorrhea. Twelve days after the rape, a police officer took Geeslin to the Madison County Health Department, where he submitted hair, saliva, blood, and semen samples for testing. Although there was evidence from which the trial

court found that Geeslin was told that his semen sample was being taken for a gonorrhea test and that the victim had contracted gonorrhea from the rape, there was not evidence that Geeslin was told that a semen sample from the victim indicated gonorrhea or that his test proved negative. Geeslin testified that he was not told that the semen sample was tested for gonorrhea and that the thought all of the test were routine. It is undisputed that the prosecutor did not tell Geeslin's counsel anything about the sperm tests or the gonorrhea.

Geeslin's counsel filed a motion requesting the court to order the district attorney to, among other things,

> "Permit the defendant to inspect and copy any results or reports of physical or mental examinations or scientific

> tests or experiments, if the examinations, tests, or experiments were made in connection with this case and the results or reports are within the possession, custody or control of the State or if their existence is known to the District Attorney."

This language tracks that of Temporary Rule 18.1(d), Ala. R. Crim. P. The trial judge wrote on this motion, "Granted insofar as the State is capable of compliance." On January 10, 1985, James Accardi, the assistant district attorney in charge of the case, submitted a response stating, in pertinent part: "Only test known to State at this time was that performed by State Department of Forensic Science on hair, saliva, etc."

Accardi admitted at the hearing on the motion for new trial that he knew in October or November of 1984 about the semen sample from the victim testing

positive and that he had subpoenaed the hospital emergency room report showing this fact. He did not produce this report in response to the order.

The trial began on January 30, 1985. Prior to that time, Accardi learned that Geeslin's test had proved negative for gonorrhea. Accardi testified that he learned this "two or three weeks, or maybe a month," after he learned about the positive results from the rape sample. This indicates that he knew of it well before he filed the response to the motion for production. After he learned of the result of Geeslin's test, he prepared expert testimony indicating that the negative result could have been affected by antibiotics taken by Geeslin during the time between the rape and his test. The record does not show that

Geeslin did in fact take any such antibiotics. The State's expert testified that tests on Geeslin's blood sample taken at the same time as the semen sample could have shown show whether Geeslin had taken antibiotics, but the State did not order such tests. The county health department preserved the blood sample until the trial, but no longer had it at the time of the hearing on the motion for new trial.

Geeslin's attorney discovered the facts about the gonorrhea tests about two weeks after trial and filed a motion for new trial on the ground, inter alia, that the State had failed to comply with the pre-trial order for production of exculpatory matter known to the State. At the hearing on this motion, Accardi testified that he did not mention this

test conducted by the county health department because he "expected the defense had access to it" because "the defendant himself was told why the test was being performed." The police officer who took Geeslin to the health department testified that he told him what the test was and why it was being conducted. The trial court accepted this explanation and denied the motion. The Court of Criminal Appeals affirmed.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held:

> "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The Court went on to observe:

> "The principle of Mooney v. Holohan[, 294 U.S. 103 (1935),] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

Id. In a footnote, the Court quoted a remark by a former solicitor general that the state's "chief business is not to achieve victory but to establish justice." Id., n. 2.

Brady is not the only source of this rule -- the opinion itself refers to prior cases -- but it is so generally cited that a suppression is often referred to as a Brady violation. Cf. Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961); Wiman v. Powell, 293 F.2d 605 (5th Cir. 1961).

One of the developements of the line of cases on this issue is the position that there is no "suppression" if the defendant is aware of the exculpatory evidence. The Court of Criminal Appeals cited a number of cases generally standing for this proposition. Another proposition is that, where the defendant makes no request or only a general request, the defendant has a higher burden of showing the materiality or probative value of the evidence before a failure to produce will warrant a new trial. United States v. Agurs, 427 U.S. 97 (1976); cf. United States v. Bagley, ___ U.S. ___, 105 S. Ct. 3375 (1985).

Without deciding whether the prosecutor's duty to produce exculpatory evidence upon a specific motion is obviated where the defendant and his

counsel have incontrovertible knowledge of the evidence, we hold that the trial court and the Court of Criminal Appeals erred in holding that the district attorney's failure to produce or inform the defense of the report was not a "suppression" on the ground of a finding, based on controverted testimony of the district attorney and a police officer, that the defendant was aware of facts which should have led him to discover the test results.

At the time the sample was taken from Geeslin, he was not represented by the lawyer who later made the motion for production, who represented Geeslin at trial, and who, in fact, was the only counsel of record throughout the proceedings below. There is some indication that another attorney

represented Geeslin at his arrest and for a short time thereafter, and that that attorney instructed Geeslin to cooperate with the police in obtaining samples. There is no indication, however, that the police told that attorney of the gonorrhea test or the reason for it, and they could not have given him the results, which were only obtained later.

Certainly, when Geeslin's trial counsel made the motion for production, Accardi had no indication that the attorney knew of the positive gonorrhea culture from the victim or of the test conducted on Geeslin or the results of that test. Accardi admitted that he had several discussions with the attorney about the motion to produce, but he never mentioned this evidence, which he considered so important he went to

condiserable effort to develop rebuttal evidence against it. Accardi communicated frequently with the employees at the county health department who conducted the test and he could very easily have asked if Geeslin had obtained the test results. Under these circumstances, and especially in view of the significant potention effect of the evidence on the jury's determination of guilt or innocence, we find that Accardi was not justified in withholding the information on the assumption that Geeslin and his attorney were so cognizant of the test and its purpose that they would certainly have discovered the test results on their own.

Because the assistant district attorney's failure to comply with the motion to produce exculpatory evidence

adversely affected the fundamental fairness of Geeslin's trial, Geeslin was denied his right not to be deprived of liberty without due process of law. U. S. Const., amend. XIV; Const. of 1901, § 6. Therefore, the Court of Criminal Appeals erred in affirming the trial court's denial of Geeslin's motion for new trial. The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

All the Justices concur.

December 5, 1986

THE STATE OF ALABAMA - - - - - -
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

85-566

EX PARTE: MARK MONROE GEESLIN
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Mark Monroe Geeslin v. State)

_____Application for rehearing overruled.
No opinion written on rehearing.
Per Curiam - All the Justices concur.

APPENDIX "C"

January 13, 1987

THE STATE OF ALABAMA ---
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1986-87

8 Div. 306

Mark Monroe Geeslin

v.

State

Appeal from Madison Circuit Court

PATTESON, JUDGE

Reversed and remanded for a new trial on authority of Ex parte Mark Monroe Geeslin, Alabama Supreme Court 85-566, November 7, 1986, ___ So.2d ___ (Ala. 1986).

REVERSED AND REMANDED.

ALL JUDGES CONCUR.

CERTIFICATE OF SERVICE

I, Gerrilyn V. Grant, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 11th day of March, 1987, I did serve the requisite number of copies of the foregoing on the Attorneys for Mark Monroe Geeslin, Petitioner, by mailing the same to them first-class postage prepaid and addressed as follows:

Honorable Joe M. Berry
Honorable Thomas E. Parker, Jr.
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P.O. Box 165
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and

Honorable C. Michael McInnish
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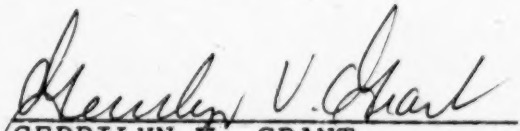

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No. 86-1469 (3)

IN THE

Supreme Court Of The United States

October Term, 1986

STATE OF ALABAMA,
Petitioner

vs.

MARK MONROE GEESLIN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

QUESTION PRESENTED

WHETHER THE STATE DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO FAIR TRIAL AND DUE PROCESS BY INTENTIONALLY WITHHOLDING EXCULPATORY RESULTS OF SCIENTIFIC TESTS ON SEMEN SAMPLES, DESPITE THE FACT THAT THE DEFENDANT HAD MADE A REQUEST FOR ALL SCIENTIFIC TEST RESULTS, NEITHER THE DEFENDANT NOR HIS ATTORNEY WERE AWARE OF THE RESULTS ON THE SEMEN SAMPLES, AND THE EVIDENCE WAS DISPUTED AS TO WHETHER OR NOT THE DEFENDANT HIMSELF WAS AWARE THAT ANY TEST HAD BEEN PERFORMED?

U.S. Const., amend. XIV

Ala. Const. 1901, Art. I, § 6

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No. 86-1469

IN THE

Supreme Court Of The United States

October Term, 1986

STATE OF ALABAMA,
Petitioner

vs.

MARK MONROE GEESLIN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

The Defendant, Mark Monroe Geeslin, was charged with the offense of first degree rape and first degree kidnapping. The only eye witness to the crime was the victim herself, Mrs. Linda Watts. The crime took place after 9:00 o'clock P.M. (R. 41, 49, 94). The victim described her attacker as unshaven and having several days growth of beard. (R. 56-61). There were numerous witnesses for the Defendant who testified that the Defendant was clean shaven on the day in question and was at home by shortly after 9:00 o'clock P.M. (R. 248, 252, 268, 271, 280, 284, 286, 292, 298, 303, 315, 318, 330, 338, 346).

Immediately after the rape, the Huntsville Police Department took the victim to have a "rape kit" performed. (R. 36, 57). The semen samples taken from the victim showed the presence of gonorrhea. (R. 409).

Twelve (12) days after the rape the Defendant was taken by the Huntsville Police Department for medical tests. (R. 404). The Defendant tested negative for gonorrhea. (R. 404). The Defendant claims that he thought they were routine tests and did not know that he was being tested for gonorrhea. (R. 430). Detective Parker of the Huntsville Police Department testified that he told the Defendant that he was being tested for gonorrhea. (R. 422). In any event, the facts are undisputed that the Defendant, Mark Monroe Geeslin, was never told the results of his tests or that the semen samples taken from the victim contained gonorrhea.

The Defendant's only attorney of record was Joe M. Berry. Mr. Berry did not discover the results of these scientific tests until two (2) weeks after the trial. (R. 450). Prior to the trial, he had filed a Motion pursuant to Rule 18.1 (d) of the *Alabama Rules of Criminal Procedure*. (R. 438). This Motion, which was granted by the Trial Judge, specifically requested results of all scientific tests. The prosecution responded by stating that "only tests known to State at this time was that performed by State Department of Forensic Science on hair, saliva, etc." (R. 439, 439).

The evidence is undisputed that the prosecution actually had full knowledge that the semen samples taken from the victim contained gonorrhea, and that the tests performed on the Defendant were negative for gonorrhea. (R. 404, 473). In fact, the prosecuting Assistant District Attorney himself was told by the State's expert that Geeslin's samples could be tested for antibiotics which would prove conclusively that Geeslin could not in fact have been the person who committed the rape. (R. 424). These tests were never performed.

After discovering that these exculpatory scientific test results had been deliberately withheld, the Defendant's counsel moved for a new trial based on the nondisclosure. (R. 450-457). The

Trial Court, as well as the Alabama Court of Criminal Appeals, held that since the Defendant himself knew tests were performed on him, he had the "essential facts" which should have led him to discover the results. The Supreme Court of Alabama, however, disagreed and reversed the lower Courts' decisions. In doing so, it stated that "because the Assistant District Attorney's failure to comply with the motion to produce exculpatory evidence adversely affected the fundamental fairness of Geeslin's trial, Geeslin was denied his right not to be deprived of liberty without due process of law". The Supreme Court of Alabama then cited the 14th Amendment to the U. S. Constitution and Section 6 to the Alabama Constitution. The facts set forth above are basically contained within the Alabama Supreme Court's decision. That decision has been produced as "Appendix B" with the State's Petition For Writ of Certiorari. It should be noted that the State's Petition For Writ of Certiorari sets forth only those facts contained within the Court of Criminal Appeals' decision. That opinion as well as the petitioner's brief reaches different factual conclusions than does the Alabama Supreme Court's opinion.

For example, the Alabama Supreme Court's opinion does not support the factual conclusion that the "test could easily have been obtained by Appellant (Defendant) from the State lab." Neither does it support the factual conclusion that the "Appellant was on notice of the essential facts which would have enabled him to take advantage of the gonorrhea test conducted by the State."

SUMMARY OF ARGUMENT

The State of Alabama has made two factual errors in its argument. First of all, neither the Defendant nor his attorney were aware that the semen samples taken from the victim indicated gonorrhea, or that Defendant's tests proved negative for gonorrhea. Therefore, the State's argument is erroneous in concluding that the Defendant had the "essential facts" to lead him to discover the test results. Secondly, the test results were

in the exclusive possession of the State, and the Defendant's counsel followed the applicable statutes in order to obtain the results of the tests which were unknown to him. The State's argument is erroneous in concluding that the defense was not diligent in trying to obtain the results to all scientific tests.

The State of Alabama has also erred in its legal reasoning. More specifically, the State has failed to cite any cases directly on point dealing with non-disclosure of scientific test results. Rather, the State has chosen to cite language taken out of context from irrelevant cases, as opposed to citing cases directly on point. *Hilliard v. Spaulding,* 719 F.2d 1443 (9th Cir. 1983) and *United States v. Poole,* 379 F.2d 645 (7th Cir. 1967) are cases directly on point that would require a reversal. The Respondent, Mark Monroe Geeslin, respectfully submits to this Honorable Court that the Supreme Court of Alabama was correct in ruling that Respondent was denied his right to fair trial and due process of law.

ARGUMENT

I. The Supreme Court Of Alabama Was Correct In Holding That The Trial Court And Court Of Criminal Appeals Erred In Concluding The Facts Did Not Support A "Suppression".

The Court of Criminal Appeals concluded that since the Defendant knew a test had been performed on him, he had the "essential facts" to lead him to obtain the results of the tests. Therefore, there was not a "suppression" under *Brady v. Maryland,* 373 U. S. 83 (1963).

The Supreme Court of Alabama disagreed and reversed the lower court's ruling. The lower courts had erred in concluding that "the Defendant was aware of facts which should have led him to discover the test results". As explained in the Alabama Supreme Court's opinion, the facts were undisputed that Geeslin was not told that a semen sample from the victim indicated gonorrhea or that his test proved negative. The tests

themselves were performed by the State and were kept in the State's exclusive possession. The Defendant's counsel had followed Rule 18.1 (d) of the Alabama Rules of Criminal Procedure in specifically requesting all exculpatory test results and reports. The prosecution, however, deliberately withheld these exculpatory test results even though "he knew of it well before he filed the response to the motion for production". The Defendant's counsel did not discover the test results until two weeks after the trial.

Therefore, the Defendant's attorney did everything he legally could to discover the unknown test results. The State does argue in its brief that "Respondent's attorneys could have telephoned the County Health Department and found out the test results just as easily as the prosecution did", but this is ridiculous. A defense attorney can not get any medical information without signed medical releases, except through the Court. There was no chance of getting a release from the victim. It may have been possible to subpoena the test results, but the defense attorney did not know the test results existed or where they were in order to subpoena them. The proper procedure through the Court is under Rule 18.1 (d), which the defense attorney followed.

"Suppression" has been defined as the "nondisclosure of evidence that the prosecution, and not the defense *attorney,* knew to be in existence." *Odgen v. Wolff,* 522 F.2nd 816, 820 (8th Cir. 1975). The evidence is undisputed that the prosecution was aware of the test results, yet the defense attorney did not discover them until two weeks after trial. The State tries to get around the definition above by claiming that "at no time did the prosecution ever receive a written report on the test results".

The law is quite clear, however, that the prosecution "must disclose all exculpatory information in the possession, custody or control of any branch of the government which is known, or, by the exercise of due diligence, may become known to the prosecution". *U. S. v. Gerrity,* 481 F. Supp. 119 (D.C. D.C. 1978). *Gerrity* explained that this obligation goes far beyond

the District Attorney's department and extends to information being held by any branch of government which aided the prosecution. Under our present facts, the Huntsville Police Department, the Department of Forensic Sciences, and the Madison County Health Department were acting as "arms of the state" in pursuing a criminal investigation. (R. 423, 415). *Pina v. Henderson,* 752 F.2d 47 (2d Cir. 1975).

Finally, the State tries to get around the definition by arguing that the attorney who represented the Defendant at the time of the test (Mark McDaniel) was told the tests were being performed. As the Supreme Court of Alabama pointed out, however, "there is no indication, however, that the police told that attorney of the gonorrhea test or the reason for it, and they could not have given him the results, which were only obtained later." In addition, "at the time the samples were taken from Geeslin, he was not represented by the lawyer who later made the motion for production, who represented Geeslin at the trial, and who, in fact, was the only counsel of record throughout the proceeding below." Furthermore, when Geeslin's trial counsel made the motion for production the prosecutor "had no indication that the attorney knew of the positive gonorrhea culture from the victim or of the test conducted on Geeslin or the results of that test."

In summary, the Supreme Court of Alabama was correct in holding that there was a "suppression" under *Brady*. The lower courts had erred in concluding that the defense was aware of the facts that should have led him to discover the test results.

II. The State Of Alabama Clearly Violated The Defendant's Constitutional Right To Due Process By Failing To Disclose The Scientific Test Results.

The State argues that the Defendant himself had the "essential facts" from which he should have discovered the test results. Therefore, there could not have been a "suppression" even though his attorney had no knowledge of the "essential facts". The Alabama Supreme Court did not agree with this factual

conclusion. Even if you assume for the sake of argument that the defense should have discovered the test results, however, the Supreme Court of Alabama would still have been correct in reversing the lower courts.

There have been numerous Federal Court decisions which have held that it would be a reversible error for the prosecution to withhold exculpatory scientific evidence, even if the defense should have discovered the test results. *Davis v. Pitchess,* 518 F.2d 141 (9th Cir. 1974); *United States v. Poole,* 379 F.2d 645 (7th Cir. 1967); *Levin v. Katzenback,* 124 U.S.App.D.C. 158, 363 F.2d 287 (1967); *Hamric v. Bailey,* 286 F.2d 390 (4th Cir. 1967); *Castleberry v. Crisp,* 414 F.Supp. 945 (D.Okla. 1976). Even more specifically, the Courts have explained that test results from semen samples are so important that their absence from the trial prevents the accused from receiving his constitutionally guaranteed fair trial. *Hilliard v. Spaulding,* 719 F.2d 1443 (9th Cir. 1983).

In *Hilliard,* the Court went on to explain as follows:

> The government's suppression of this type of evidence, which deprives the Defendant from what could be his only opportunity to conclusively prove his innocence, can not withstand constitutional scrutiny. We therefore hold that in a case of this type if a sperm sample is taken from the victim and the prosecution is in possession of or has control over this sample, and is aware of its exculpatory nature, the prosecution is constitutionally required to disclose the existence of the sample, to make it available to the defense, even if defense counsel does not specifically request that the prosecution do so.

This Honorable Court should also note that the dissenting opinion in *Hilliard* points out that both the Defendant and his counsel were aware that the semen slides had been prepared prior to trial. The majority, however, concluded that the semen slides were so vitally crucial to the trial that the Defendant could not possibly receive a fair trial without it being disclosed to the jury.

The facts in our case are even more favorable to the Defen-

dant. Our facts are undisputed that the Defendant's attorney did not discover the results from the scientific tests until two weeks after the trial. (R. 450).

Similar to our present case, in *Poole,* supra, the prosecution also argued that its failure to disclose certain scientific test results should be excused due to the defense's lack of due diligence. The Court, in its opinion, agreed with the prosecution that the defense counsel was not diligent in following up on information obtained at the preliminary hearing which could have led to the undisclosed evidence. The Court went on to explain, however, that the government failed to correct the misinformation in *Poole,* and the Defendant should not suffer for the mistake of his counsel. It was stated that "under these circumstances, we think the interest of truth, and of the Defendant, would have been served materially if the reports would have been disclosed".

Similarly, in *Davis v. Pitchess,* supra, the 9th Circuit also held that evidence of this nature which would scientifically establish that the Defendant was not the attacker must be available for trial, or it would be impossible for the Defendant to receive a fair trial. Very similar arguments made by the State in the present case were also made in *Levin,* supra, and *Castleberry,* supra. In *Levin* the U. S. Court of Appeals addressed the issue as follows:

> Ordinarily, a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of the newly discovered evidence. But the Appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceeding, and relief, either on a motion for a new trial or for *habeas corpus,* may not depend on whether more able, diligent, or fortunate counsel might have possible come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the cleverest party, or the one with the greatest resources, to be the winner. (at p. 291).

Castleberry addressed the same argument being made by the State of Alabama as follows:

> While it is relevant to determine whether defense counsel had independent knowledge of the evidence, whether a request was made, and whether the evidence was intentionally or unintentionally withheld, the basic test is whether the undisclosed evidence was so important that it's absence prevented the accused from receiving his constitutionally guaranteed fair trial.
>
> As stated in *United States vs. Hibler,* 463 F.2d 455 (9th Cir. 1972);
>
> That defense counsel did not specifically request the information, that a diligent defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are not conclusive; due process can be denied by failure to disclose alone. (At p. 404).

All of these cases cited immediately above are aimed at insuring that the accused receives a fair trial. As repeated by the Alabama Supreme Court in the present case, "the State's chief business is not to achieve victory but to establish justice".

Semen samples taken from the rape victim contained gonorrhea. Mark Geeslin was tested for gonorrhea by the State twelve (12) days after the alleged rape. His tests proved negative, and there was no evidence whatsoever that he had had any antibiotics to alter the test results.

This scientific evidence conclusively proves that Mark Monroe Geeslin is innocent of the crime for which he was convicted. The evidence is also undisputed that the prosecutor intentionally withheld these test results, which took away the only opportunity the Defendant had to conclusively prove his innocence. This certainly prevented a fair trial, and this certainly cannot withstand constitutional scrutiny. *Hilliard,* supra; *Poole,* supra.

The State has cited a line of cases for the proposition that there is not a suppression under *Brady* so long as the Defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence. This language originated with a line of 2nd Circuit cases dealing with the discovery of prior inconsistent statements. *United States v. Ruggiero,* 472 F.2d 599 (2nd Cir. 1973); *United States v. Robinson,* 560 F.2d 507

(2nd Cir. 1977); *United States v. Stewart,* 513 F.2d 957 (2nd Cir. 1975); *United States v. Brown,* 582 F.2d 197, 200 (2nd Cir. 1978); *United States v. Leroy,* 687 F.2d 610, 618 (2nd Cir. 1982). This language has also been adopted by the 5th and 11th Circuits. *United States v. McKenzie,* 768 F.2d 602, 608 (5th Cir. 1985); *Jarrell v. Balkcom,* 735 F.2d 1242, 1258 (11th Cir. 1984).

A close reading of each of these cases, however, will show they are not on point with our present fact situation. The "essential facts" language originated out of the 2nd Circuit while dealing with impeachment testimony only. More specifically, the 2nd Circuit Court of Appeals has ruled that the prosecution does not have to reveal impeachment testimony obtained from potential witnesses, so long as the name of those witnesses are available to the defense. There is not a single case cited by the State which deals with the nondisclosure of scientific test results. In fact, the State has not argued a single case on point with our present fact situation.

Hilliard, supra, and *Poole,* supra, dealt directly with the nondisclosure of tests concerning semen samples. In both of those cases the 9th and 7th Circuits expressly and specifically held that the test results must be disclosed to the Defendant's counsel. This was true in *Hilliard* even though "the Defendant and his counsel were made aware that a sperm slide had been prepared". This was true in *Poole* even though the Court expressly stated that the "defense counsel was not diligent". Therefore, the prosecution for the State of Alabama clearly violated the Defendant's constitutional right to a fair trial and due process by failing to disclose the test results.

CONCLUSION

In conclusion, the Respondent respectfully requests that this Honorable Court deny the State of Alabama's Petition for Writ of Certiorari. This request is made because the Supreme Court of Alabama was correct in holding that the Defendant, Mark Monroe Geeslin, was denied his right not to be deprived of liberty without due process of law.

Respectfully submitted,

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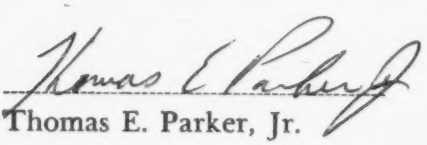
By: 
Thomas E. Parker, Jr.

CERTIFICATE OF SERVICE

I, Thomas E. Parker, Jr., a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Mark Monroe Geeslin, hereby certify that on this the 8th day of April, 1987, I did serve the requisite number of copies of the foregoing on the Attorneys for the State of Alabama, by mailing the same to them first-class postage prepaid and addressed as follows:

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